United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7134

To be argued by
Harold L. Warner, Jr.

United States Court of Appeals
FOR THE SECOND CIRCUIT

BRS

UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

Plaintiffs-Appellees,

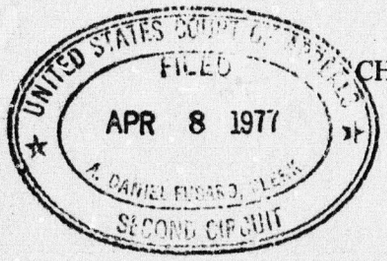
-against-

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

Defendants-Appellants.

On Appeal from an Order of the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLANT TRANS WORLD AIRLINES, INC.



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATH-FINDER CORPORATION and UNITOURS,	:	
Plaintiffs-Appellees,	:	Appeal No. 77-7134
-against-	:	
TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,	:	
Defendants-Appellants.	:	

BRIEF OF DEFENDANT-APPELLANT TRANS WORLD AIRLINES, INC.

PRELIMINARY STATEMENT

In this action plaintiffs, an association of charter and tour operators and five of its members, seek to enjoin defendants, Trans World Airlines, Inc. ("TWA") and Travellers Air Services, Inc. ("TAS"), from performing a $7,000,000 series of Advance Booking Charters ("ABC"s) and Inclusive Tour Charters ("ITC"s) from the United States to Europe. As of March 2, 1977 over 10,000 passengers had made reservations for these charter

trips, which are scheduled to commence in May and continue throughout the 1977 season. These charters are expressly authorized by Parts 371 and 378 respectively of the CAB's Regulations, 14 C.F.R. §§ 371 and 378.

TWA now appeals from the orders of Hon. Charles E. Stewart, Jr. entered on March 15 and March 23, 1977 denying TWA's motion to dismiss the complaint on the ground that jurisdiction is vested in the CAB.

THE FACTS

On October 14, 1976 TWA and TAS jointly filed with the CAB an ABC and an ITC prospectus covering 160 charter trips from the United States to Great Britain, France, Ireland, Italy, Spain and Switzerland (A 12, 21).* This program was reviewed by the CAB and became effective on October 28, 1976 (A 22).

On or about November 8, 1976 plaintiff United States Tour Operators Association requested that the CAB Bureau of Enforcement investigate the legality of the TAS/TWA charter program. Such an investigation was undertaken by the CAB Bureau of Enforcement and is currently in progress (A 22).

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* References marked "A" are to the Appendix filed herewith.

The Complaint

In essence, plaintiffs' complaint alleges that TAS is not an "independent principal" with respect to the air transportation involved in the TAS/TWA 1977 charters, and that TWA "through its various tour, charter, marketing and advertising programs exercises both economic and operational control over [TAS]" (A 12).

The Regulations and Statute Involved

Plaintiffs allege that the defendants have violated Sections 371.10(a) and 378.2(b)(6) of the CAB's regulations, 14 C.F.R. §§ 371.10(a), 378.2(b)(6). These sections contain identical language and, for simplicity, only one will be quoted. Section 378.2(b)(6) provides:

> "(6) The tour shall be arranged and sold by a tour operator acting solely as an independent principal with respect to the air transportation included in the inclusive tour charter and not as an agent for direct air carriers." (A 87)

Neither the statute, the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq. ("the Act"), nor TWA's certificate, contains any such requirement. Rather, the Act contains a prohibition that supplemental air carriers (carriers other than scheduled air carriers such as TWA) may not sell tickets directly to the public. Section 101(36) of the Act, 49 U.S.C. § 1301(36), provides in pertinent part:

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"Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour in air transportation by selling or offering for sale individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by, or under common control with, a person authorized by the Board to make such sales." (Emphasis supplied.)

The Proceedings Below

This action was begun with the service of a summons and complaint dated February 24, 1977, and an order to show cause with the same date ordering defendants to appear before Judge Stewart on March 2, 1977, to show cause why an order for expedited discovery on the part of plaintiffs should not be granted. No motion for preliminary injunctive relief has been sought by the plaintiffs.

On the return date of the order to show cause, March 2, 1977, TWA served and filed a motion to dismiss the complaint on the ground that jurisdiction was vested in the CAB. At the request of plaintiffs' counsel, Judge Stewart set a return date of March 10, 1977 to allow plaintiffs to respond to TWA's motion (A 16).

Shortly before oral argument on March 10, 1977, counsel for TWA were served with a motion by the Bureau of Enforcement of the CAB for leave to intervene as amicus curiae. The CAB Bureau of Enforcement took no position

on the merits of the case. Instead, it simply said that even though it was conducting its own investigation of the charges, it had no objection to the action proceeding in court.

Judge Stewart granted the Bureau of Enforcement's motion to intervene as amicus curiae and, upon conclusion of oral argument, read a decision from the bench denying TWA's motion to dismiss the complaint and granting plaintiffs' motion for expedited discovery. An order by Judge Stewart, referring to the decision read from the bench, was entered on March 15, 1977 (A 97-101, 102).

On that same date, March 15, 1977, TWA moved before Judge Stewart for reargument and reconsideration of its motion to dismiss and, alternatively, for an order staying all proceedings in this action pending an appeal to this Court (A 103).

By order dated March 23, 1977, and entered on the same day, Judge Stewart granted TWA's motion for reconsideration but again denied TWA's motion to dismiss and denied TWA's motion for a stay pending appeal (A 106-108).

THE STAY GRANTED BY THIS COURT

TWA, on March 23, 1977, filed a notice of appeal to this Court and served and filed a motion in this Court for an order staying all proceedings pending appeal. By agreement with plaintiffs' counsel, the motion for a stay was

made returnable on March 29, 1977.

On March 28, 1977, plaintiffs served and filed their papers in opposition to TWA's motion for a stay and cross-moved to dismiss the appeal on the grounds that there was no appeal of right from Judge Stewart's orders. In its moving papers to this Court, TWA had specifically addressed itself to the fact that under this Court's decisions in C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974), and more recently in Local 771 I.A.T.S.E., AFL-CIO v. RKO General, Inc., WOR Division, F.2d (2d Cir.) (Slip op. March 3, 1977, Docket No. 76-7430), TWA had an appeal as of right from Judge Stewart's orders.

At the hearing of TWA's motion before Judges Mansfield, Gurfein and Newman, Judge Mansfield, speaking for the Court, noted that this case presented important issues meriting appellate review and granted TWA's motion for a stay pending this expedited appeal.

ARGUMENT

JURISDICTION IS VESTED IN THE CIVIL AERONAUTICS BOARD

This case presents a classic illustration of when the doctrine of primary jurisdiction should be invoked by a district court. The basic questions here involved, that is, who may operate charter air transportation across the North Atlantic and how may such operation be conducted, are of the very essence of the CAB's jurisdiction. The CAB, which phrased and promulgated the charter regulations, should be afforded an opportunity to interpret its regulations. Furthermore, the CAB is currently exercising its jurisdiction. Retention of jurisdiction by the district court would thus invite the risk of court-agency conflict which the doctrine is especially designed to avoid. Finally, invocation of the doctrine of primary jurisdiction in this case will encourage the uniform regulation of an industry that Congress has subjected to a pervasive regulatory scheme.

A. The Basic Questions In This Case Are Of The Very Essence Of The CAB's Jurisdiction.

The injunctive relief sought in this lawsuit is designed to permit the individual tour operator plaintiffs to operate charter air transportation to Europe this summer

without any competition from the TAS/TWA charters. This is of especial interest to the plaintiff, Arthur Frommer Charters, Inc., who, with British Airways, is engaged in a much larger charter program between the United States and Great Britain.

Thus the basic questions in this case are "who shall be allowed to operate charter air transportation across the North Atlantic this summer" and "how may such operation be conducted".

This is the very essence of the CAB's jurisdiction. As the Supreme Court of the United States said in Pan American World Airways, Inc. v. United States, 371 U.S. 296, 305 (1963):

> "The acts charged in this civil suit . . . are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."

B. The CAB Should Be Afforded An Opportunity To Interpret Its Own Regulations.

It is the thesis of plaintiffs' complaint that because (1) TAS has leased from TWA "aircraft for approximately 160 flights between the United States and Western Europe for the spring and summer of 1977" (Complaint ¶ 23; A 12) and (2) "TWA, through its various tour, charter, marketing and advertising programs, exercises both economic

and operational control over [TAS]" (Complaint ¶ 22; A 12), that TAS has "become TWA's agent" and this relationship "violates the CAB regulations governing charter programs" (Complaint ¶ 24; A 13).

Whether or not the actions alleged by the plaintiffs constitute a violation of the CAB's regulations is a matter peculiarly within the jurisdiction of the CAB, at least in the first instance. Plaintiffs' suggested interpretation of the CAB's regulations would make it impossible for TWA to engage effectively in charter air transportation. Certainly it is up to the CAB to determine in the first instance whether its regulations are violated, merely on account of the size of the charter program, the size of TWA and the extent of TWA's marketing and advertising programs.

The fact is that, within the letter and spirit of that term, TAS is an independent principal with respect to the air transportation included in the TAS/TWA 1977 charters. TAS is not acting as an agent for TWA. TWA does not control TAS and TWA owns no stock and has no financial interest in TAS (A 22). Furthermore, TWA does not sell tickets to the public for this charter air transportation. Such sales are made solely by TAS and independent travel agents throughout the United States.

There is nothing in the Act nor TWA's certificates which contains any requirement prohibiting TWA from selling charter transportation directly to the public. The prohibition in Section 101(36) of the Act, 49 U.S.C. § 1301(36), applies solely to supplemental air carriers. This section of the Act prohibits supplemental air carriers from selling individual tickets directly to members of the general public, or to do so indirectly by controlling, being controlled by or under common control with a person authorized by the CAB to make such sales.

Significantly, when the CAB first adopted its step-by-step liberalization of its charter regulations so as to make low cost, mass transportation available to the general public, the supplemental air carriers protested the CAB's regulations and urged that they be allowed to sell tickets directly to the general public. In rejecting this plea of the supplemental air carriers, the United States Court of Appeals for the District of Columbia Circuit said:

> "The Board's reason for requiring an independent organizer is almost disarmingly simple—it is a further mechanism for separating the supplemental air carrier from the marketing of individual tickets to the general public. In light of Congress' specific prohibition in the inclusive tour market, 49 U.S.C. § 1301(34) (1970):

> Nothing in this paragraph shall permit a supplemental air carrier to sell or offer for sale an inclusive tour . . . by selling . . . individual tickets directly to members of the general public, or to do so indirectly by controlling . . . a person authorized by the Board to make such sales.

We find this requirement to be eminently reasonable." Saturn Airways, Inc. v. C.A.B., 483 F.2d 1284, 1293-1294 (D.C. Cir. 1973).

This "requirement", however, - should it be applied to a regularly scheduled airline in the manner suggested by plaintiffs - would be entirely unreasonable. No "mechanism" whatsoever is needed in the case of a regularly scheduled airline to avoid Congress' specific prohibition against the selling of individual tickets by a supplemental airline directly to members of the general public.

Presumably the CAB imposed the ABC and ITC prohibition against direct sales on the regularly scheduled airlines so that they would not have a competitive advantage over the supplemental airlines in vying for charter traffic. This constraint, however, is entirely artificial in the case of the regularly scheduled airlines, rendering largely useless their sales force in the selling of such traffic and unreasonably adding to their costs in selling charter air transportation. If, as the complaint alleges, TWA may not market a charter program simply because of the size of the charter program or because TWA is larger than the tour

operator, TWA will be effectively excluded from the charter market. No such interpretation can be adopted until the CAB is afforded an opportunity to interpret the regulations which it "phrased and promulgated". American Airlines, Inc. v. Standard Air Lines, Inc., 80 F. Supp. 135, 139 (S.D.N.Y. 1948).

Plaintiffs' complaint in paragraph 22 (A 12) appears to suggest that TWA's advertising of the TAS/TWA charters is somehow improper and constitutes both economic and operational control by TWA over TAS.

But the CAB clearly intended that direct air carriers might engage in "mass media" advertising. When the CAB adopted its revolutionary Travel Group Charter ("TGC") regulations in 1972, 37 Fed. Reg. 20,808, the CAB felt it important that all members of the public know of the availability of such charters. With respect to "mass media" advertising, the CAB said (SPR-61, p. 28; 37 Fed. Reg. 20,814):

> "We have decided not to retain in the final rule the proposed prohibition against mass media advertising. We are persuaded that a ban on the availability of these charters to the public at large tends toward the same kind of discrimination which is inherent in the affinity charters. Under such a ban, certain members of the public might not know of the availability of TGC charters simply because they were not recipients of 'limited distribution' advertisements and other publications aimed at selected audiences. Moreover, we believe that the workability of the TGC concept and the public demand for it will be more validly tested if all members of the public have reasonable opportunities to participate in such TGC's as may be organized."

Plaintiffs further purport to find alleged "control" by TWA over TAS in the fact that the TAS/TWA charter program included 160 flights (Complaint, ¶ 23; A 12). Clearly, the CAB knew the size of the TAS/TWA charter program when the CAB allowed the TAS/TWA charter prospectuses to become effective on October 28, 1976. The CAB encourages substantial charter programs. Indeed, the CAB has referred to its continuing broadening of the term "charter" as its "step-by-step development of low-cost bulk transportation", EDR-287 (September 18, 1975), Explanatory Statement, p. 2.

Clearly, the determination of the question in this case as to whether the TAS/TWA charter program meets the criteria established by the CAB in its ABC and ITC regulations "demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal". Civil Aeronautics Board v. Modern Air Transport, 179 F.2d 622, 624 (2d Cir. 1950). The CAB should be afforded an opportunity to interpret its charter regulations as applied to this case.

C. The CAB Is Currently Exercising Jurisdiction In This Case.

The CAB is currently exercising jurisdiction in this case. Since November 14, 1976, the Bureau of Enforcement

of the CAB has been investigating the informal complaint lodged with it by the plaintiff United States Tour Operators Association challenging the legality of the TAS/TWA 1977 charter program.

By the time this appeal is argued, the Director of the Bureau of Enforcement may have instituted an enforcement proceeding pursuant to the CAB's Rules of Practice, 14 C.F.R. § 302.206, or he may have advised the plaintiff United States Tour Operators Association that no enforcement proceeding will be instituted with respect to its complaint, and the reasons therefor.

Should the Director of the Bureau of Enforcement refuse to institute an enforcement proceeding, plaintiff may file a motion with the CAB to review such action. 14 C.F.R. § 302.205(c).

In this connection, it should be noted that the CAB's Rules of Practice specifically permit plaintiff to file a motion for suspension of the economic operating authority of TWA, pendente lite, with respect to the TAS/TWA charters. 14 C.F.R. § 302.217. Furthermore, the ABC charter regulations specifically provide:

> "The Board reserves the power to suspend the exemption authority of any charter operator, without hearing, if it finds that such action is necessary in order to protect the rights of the traveling public." 14 C.F.R. § 371.24 (A 77).

Whether or not it is true, as the CAB's Bureau of Enforcement asserts, that the maintenance of this action in the District Court "would not interfere with their ongoing investigation" (A 100), this dual consideration of similar issues clearly invites the risk of court-agency confrontation which the doctrine of primary jurisdiction is designed to prevent.*

D. Uniformity And Consistency In The Regulation Of The Air Transport Industry Requires Preliminary Resort To The CAB.

The doctrine of primary jurisdiction serves other important purposes as well as to avoid court-agency conflict. As stated by Judge Richey in Nader v. Air Transport Association of America, F. Supp. , 14 Avi. 17,605 (D.D.C. No. 76-1180, Feb. 9, 1977):

> "One of the most significant purposes of the doctrine [of primary jurisdiction] is to encourage 'uniform' regulation of industries that Congress has subjected to a pervasive regulatory scheme, particularly when the substance of an

* The confusion engendered by dual proceedings is aptly illustrated by the case of DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982, 985 (9th Cir. 1975), where the CAB and the district court came to conflicting decisions within two days of each other.

alleged antitrust violation, here reservations practices, is 'basic in the regulatory scheme' and a 'precise ingredient of the Board's authority.' Pan American World Airways, Inc. v. United States, supra, 371 U.S. at 305. As the Ninth Circuit described this purpose of primary jurisdiction:

> [W]hen a regulatory agency has pervasive authority and the ability and expertise to exercise coordinated control over an entire industry and over all facts of that industry's behavior, the agency having this overview of the entire industry is in the better position to resolve wholly intra-industry problems, and, being more attuned to the problems of the whole industry, better able to formulate and implement remedies which are flexible and deal with all of the intra-industry ramifications. . . . In essence, it reflects a congressional determination that continuing regulation is a better calibrated tool for dealing with and controlling anti-competitive behavior within an industry than the more blunt and generalized instrument of the antitrust laws. . . . In light of these factors, the District Court is to refrain from immediate or hasty interference in intra-industry problems of industries subject to the control of a regulatory agency, until the regulatory agency has had an opportunity to carry out the functions for which it was initially created by Congress.

Foremost International Tours, Inc. v. Quantas Airways Ltd. [13 Avi. 18,105], 525 F.2d 281, 284-85 (9th Cir. 1975)." 14 Avi. at 17,609-10.

Identical views emphasizing the need to secure uniformity and consistency in the regulation of business entrusted to a particular agency, were set forth by this Court in Danna v. Air France, 463 F.2d 407, 411 at fn. 14 (2d Cir. 1972), where the Court said:

> "[It is] now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The CAB is the agency entrusted by Congress to regulate the air transport industry. The CAB's intricate charter regulations have been developed over the years in an effort to bring low-cost bulk transportation to the general public, while maintaining an appropriate balance between the scheduled and supplemental air carriers. It is for the CAB, not the district courts, to rule on how charter air transportation may be marketed.

E. The Doctrine of Primary Jurisdiction Should Be Invoked In Suits By Private Parties Under Section 1007(a) Of The Act When The Challenged Operation Is Conducted Under A Currently Effective CAB Exemption.

In Civil Aeronautics Board v. Modern Air Transport, Inc., 179 F.2d 622 (2d Cir. 1950), this Court expressly reserved decision on the question of whether a district court should entertain jurisdiction to enjoin the activities of an

air carrier at the suit of a private party without action by the agency entrusted with its regulation. In so ruling, the Court said:

> "We express no opinion as to the jurisdiction of the district court to issue an injunction at the suit of a private party. Such jurisdiction has been denied in Trans-Pacific Airlines, Ltd., v. Hawaiian Airlines, Ltd., 9 Cir., 174 F.2d 63, and American Airlines, Inc., v. Standard Air Lines, Inc., D.C.S.D.N.Y., 80 F.Supp. 135, though cf. Pacific Northern Airlines v. Alaska Airlines, D.C.Alaska, 80 F.Supp. 592. There the court may well show an understandable reluctance to control the activities of an air carrier without action by the agency entrusted with its regulation." 179 F.2d at 626.

Of course, the doctrine of primary jurisdiction "does not apply when the agency itself is plaintiff". C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251, 254 (2d Cir. 1974). Such also was the holding of this Court in Civil Aeronautics Board v. Modern Air Transport, Inc., supra.

Likewise, the doctrine is inapplicable in cases where an air carrier is conducting operations in clear violation of its existing certificate. World Airways, Inc. v. Northeast Airlines, Inc., 349 F.2d 1007 (1st Cir. 1965), cert. denied, 382 U.S. 984 (1966). By the same token, a district court should be free to enjoin operations conducted without any authority from the Civil Aeronautics Board. Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9th Cir. 1972).

Where, as here, operations are being conducted under a currently effective exemption authorized by the CAB, a district court should not entertain jurisdiction at the suit of a private party without resort to the administrative expertise of the CAB.

Particularly is that true in cases such as the one here presented where the issues involve "matters of public interest in the domain of air transportation". American Airlines, Inc. v. Standard Air Lines, Inc., 80 F. Supp. 135, 139 (S.D.N.Y. 1948). In the American Airlines case, supra, as here, the plaintiff had invoked Section 1007(a) as authorizing direct injunctive relief for alleged violation of Section 401(a) of the Act. The question posed in that case involved an interpretation of a regulation promulgated by the CAB granting an exemption from Section 401(a) of the Act so as to permit operations by irregular air carriers without a certificate of public convenience and necessity. Because the question involved was of a kind that could be a highly technical one calling for expert knowledge of the industry, and the CAB, which phrased and promulgated the Regulation, was much better equipped and qualified to determine the question than the court could possibly be, Judge Kaufman denied plaintiff's request for an injunction saying, 80 F. Supp. pp. 139-140:

"Reading the various relevant portions of the Act and of Section 292.1 of the Economic Regulation, and taking into account the public policy behind them, I conclude that it was not intended that the Courts should, in the first instance, undertake to determine whether or not one who holds a letter of Registration as an Irregular Air Carrier, duly issued by the Board and still in effect, has forfeited the right to operate as such. I can conceive of serious chaos and conflict with the Board if the Courts were to do so. Taking all of these provisions together, I am of the opinion that the question involves matters of public interest in the domain of air transportation - a subject on which the Board is 'the final arbiter' (United Air Lines v. Civil Aeronautics Board, 81 U.S.App.D.C. 89, 155 F.2d 169, 173), and that jurisdiction to make such a determination and decision is, at least initially, in the Board. See Adler v. Chicago & Southern Air Lines, Inc., D.C., 41 F.Supp. 366, and cases there cited."

In so ruling, Judge Kaufman stated that he had not overlooked Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd., 73 F. Supp. 68, saying that he found himself unable to adopt that ruling.

Judge Kaufman proved to be correct. Shortly thereafter, the United States Court of Appeals for the Ninth Circuit reversed the district court by its holding in Trans-Pacific Airlines, Ltd. v. Hawaiian Airlines, Ltd., 174 F.2d 63 (9th Cir. 1949).

In reversing the district court's order and holding that primary jurisdiction was vested in the CAB, the Ninth Circuit Court said:

". . . prior to judicial intervention, problems which involve expert knowledge of multitudinous detail of intricate nature in a technical field require that recourse should be had to administrative bodies. Especially is this true where uniformity of interpretation of rules and consistency in application, in view of an overall policy, is compelled by the legislative mandate. Then is there not only a commitment of primary, but likewise of exclusive, jurisdiction to the administrative, and exhaustion of the remedies is mandatory. Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U.S. 138, 34 S.Ct. 885, 58 L.Ed. 1255.

"The function of the Board did not end here with the promulgation of the Economic Regulations. Power to terminate suspend or revoke the certificate of registration was reserved by the Board . . . The courts should not interfere with this formulative process, for the natural administrative lines might be distorted and the purpose of the Act in creating an administrative agency frustrated." 174 F.2d at 66.

More recently, in DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982 (9th Cir. 1975), the Ninth Circuit Court, although finding it unnecessary to decide the question of the CAB's primary jurisdiction in a case where plaintiff sought to enjoin the operations of an air freight forwarder, had this to say on the CAB's jurisdiction (522 F.2d at 985):

"We note that it seems quite unnecessary and uneconomical of judicial time and energy for a court to conduct hearings producing eleven volumes of record and transcript to determine whether to enjoin conduct which the court, as here, explicitly recognized was to be authoritatively judged by the C.A.B. The confusion engendered by such dual proceedings is aptly shown by the facts of this case: the district court and the C.A.B. came to conflicting

> decisions within two days of each other. The question naturally arises whether such a question, requiring not only C.A.B. expertise in determining national policy, but also the exercise of C.A.B. discretion, is not one which under the broad principles announced by the Supreme Court in Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 should be left to the C.A.B. until it has made its decision. See Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th Cir. 1973); Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C.Cir. 1975)."

Because the challenged conduct, as here, involved violation of a CAB regulation and not a violation of § 401(a) of the Act requiring a certificate of public convenience and necessity, the court held that the plaintiff was without standing to assert the statutory cause of action.

The plaintiffs here derive their authority to act as indirect air carriers solely from a CAB exemption. Their challenge to the legality of the TAS/TWA charters is bottomed on an unreasonable interpretation of an artificial and unnecessary restraint. Since this restraint appears solely in a regulation, not in the Act or in a certificate of public convenience and necessity, plaintiffs are "without standing to assert the statutory cause of action". DHL Corporation v. Loomis Courier Service, Inc., supra at 985. Even were there the requisite standing, the complaint herein should be dismissed since primary jurisdiction is vested in the CAB.

CONCLUSION

The orders of the district court denying defendants' motions to dismiss the complaint should be reversed and the complaint dismissed with costs to appellants.

Respectfully submitted,

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